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March 28, 2005

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VIA HAND DELIVERY

Hon. Pat Miller, Chairman  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37238

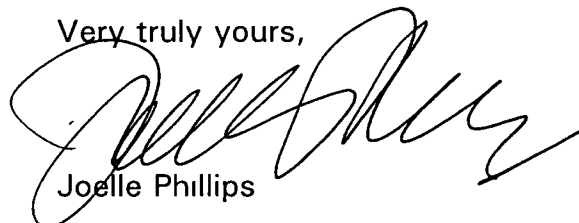
Re: *Petition to Establish Generic Docket to Consider Amendments to  
Interconnection Agreements Resulting from Changes of Law*  
Docket No. 04-00381

Dear Chairman Miller:

Enclosed is the original and fourteen copies of BellSouth Telecommunications Inc.'s Response to the Joint Petitioners' Motion to Bifurcate. The parties have engaged in discussions in an effort to reach agreement on the procedural issues in this case. As these discussions continued into late last week, BellSouth did not file a response earlier. A copy of this filing was provided previously to the parties on Friday, March 25, 2005, to provide them with time to review the filing in advance of the Status Conference.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Joelle Phillips

JP:nc

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to  
Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

**BELLSOUTH TELECOMMUNICATIONS INC.'S**  
**RESPONSE TO THE JOINT PETITIONERS'**  
**MOTION TO BIFURCATE**

BellSouth Telecommunications, Inc. ("BellSouth") submits this response to the *Motion to Bifurcate* ("Motion") filed by NuVox/NewSouth, KMC III, KMC V, and Xspedius ("Joint Petitioners") on March 7, 2005. BellSouth objects to "bifurcating" issues based on whether an issue arose out of the TRO (and was not impacted by USTA II) as opposed to the TRRO. BellSouth endorses an alternative form of bifurcation in which the Authority rules on certain issues that do not require a fact-finding hearing before accepting pre-filed testimony or moving to factual questions. Because certain questions are issue determinative (the answers to the questions either eliminate or trigger subsequent issues), bifurcation of the issues that do not require a fact-finding hearing and issues that do require such a hearing makes sense and would achieve efficiency. To more fully explain its view of bifurcation, BellSouth includes below an overview of the status of this docket, its specific concerns with the Joint Petitioners' Motion, an explanation of how the proceeding should be bifurcated, and a proposed timeline for procedural and scheduling matters.

## **BACKGROUND**

During a March 8, 2005 status conference, Director Tate expressed a desire to have issues in this generic change of law proceeding “heard as soon as possible.” (Mar. 8, 2005, Tr., p. 13). The parties explained that discussions concerning the issues and a possible procedural schedule were ongoing. Since March 8, 2005, the parties have had extensive communications concerning the development of an issues list for this proceeding. While no binding agreement has been reached regarding the final issues list, the parties have made substantial progress and there appear to be only a few issues still in dispute. Attached as Exhibit 1 is the current version of the issues list; those issues that are clearly still in dispute are highlighted.<sup>1</sup> Because the parties have not yet reached agreement on the ultimate issues to be addressed, no procedural schedule has been discussed or agreed upon by the parties.

## **THE BIFURCATION ISSUE**

With respect to bifurcation, BellSouth does not oppose organizing this docket in a manner that starts with one set of issues and then proceeds to a second set. In fact, BellSouth believes that considerable hearing time in this docket will be saved if the Authority considers certain issues first, before proceeding to other issues. This bifurcation, however, should not be based on whether issues are related to the TRO and USTA II, or related to the TRRO. Bifurcation along those lines, which is what the Joint Petitioners appear to be seeking, would be inefficient, would probably require multiple hearings, and would no doubt extend, not shorten this process.

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<sup>1</sup> Importantly, BellSouth does not represent that the parties have reached final agreement of the non-highlighted issues. BellSouth has simply included the most recent iteration of the issues list and is awaiting feedback from the CLECs on this version. BellSouth anticipates that all parties can address the issues and the final resolution of the wording at the March 28, 2005 status conference.

BellSouth is also concerned that the Joint Petitioners' version of a "bifurcated" proceeding would result in the "piecemeal" amendment of existing interconnection agreements. BellSouth's position is that where change of law has been invoked as to existing interconnection agreements, only one amendment to address all outstanding change of law issues should occur. That is, when the existing interconnection agreement is amended, the resulting agreement should be compliant with the law at the time of amendment, not "partially" in compliance. Because of the possibility that the Joint Petitioners' motion, if granted, would result in delays in resolving these matters, and result in "piecemeal" amendments to the existing contracts, BellSouth objects to the Joint Petitioners' motion to bifurcate.

Notwithstanding BellSouth's objection to the Joint Petitioner's Motion, BellSouth agrees that this docket may be best resolved in a two-phase process, organized between (1) those issues that can be resolved as a matter of law, either because the issue is solely a question of law, or because there is no reasonable factual dispute, and (2) those issues that may require some factual determination in order to resolve.

One of the best examples that can be used to illustrate this distinction is draft Issue 9, which has three parts. The first part raises the question of whether a state commission can require that Section 271 network elements, or network elements that might exist under some state law, if any, be included in a Section 252 interconnection agreement. BellSouth's position is that as a matter of law, a state commission cannot impose such a requirement. See *e.g. MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11<sup>th</sup> Cir 2002), also *Coserv Limited Liability Corp. v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5<sup>th</sup> Cir 2003).

The need to get to the second and third part of Issue 9 turns on the resolution of this threshold issue. For example, if a state commission can require the inclusion of Section 271 elements in a Section 252 agreement, then there is the separate sub-issue found in Issue 9 dealing with whether the state commission can establish rates for those elements<sup>2</sup> This issue never needs to be reached if there is no jurisdiction to require the inclusion of these elements in the interconnection agreement in the first instance. Of course, if the state commission can establish those rates, then there is yet a third sub-issue dealing with what those rates should be. BellSouth's point, in support of its view of how the process should be bifurcated, is that there is no need to get to the second and third sub-issue, if the Authority concludes that it has no jurisdiction to require the inclusion of Section 271 or separate state elements in the interconnection agreement at the outset.

In addition to those situations where the resolution of the issue turns solely on a legal question, there are other issues where BellSouth believes that reasonable people cannot disagree about the outcome of the issue, and that such issues can and should be resolved without the need for a hearing. For instance, draft Issue 22 deals with the appropriate ICA language, if any, to address packet switching. The TRO, at ¶ 537 explicitly states CLECs are not impaired, on a national basis, without access to unbundled packet switching. Thus, as a matter of law, there should be no language in any interconnection agreement requiring the unbundling of packet switching. No hearing is needed to resolve this issue.

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<sup>2</sup> In this regard, BellSouth believes that only the FCC can set "just and reasonable rates" under Section 271. The Joint Petitioners, no doubt, disagree.

As a practical matter, in terms of both the Authority's and the parties' resources, if these types of issues are not resolved first, the Authority may find that it has wasted, days, if not weeks, accepting evidence that is simply unnecessary, such as evidence about rates for elements that it cannot order included in an interconnection agreement. Such a nonsensical result supports BellSouth's request to bifurcate this docket to first consider questions that do not require a hearing, followed by issues that require some factual determination.

Consequently, BellSouth proposes a bifurcated proceeding, with the bifurcation as follows. First, the parties would identify the issues that they believe don't require a hearing. Next, the parties would brief those issues. If there were a disagreement about whether the issue required a hearing, the briefs would address that dispute. The Authority would resolve the issues that it concludes do not require a hearing, based on the briefs of the parties. Then, the next stage of the docket would address the issues that will require some factual determination to resolve. This method of bifurcation will actually permit the Authority or any other state commission to achieve and recognize efficiency in the resolution of the disputes raised in this generic proceeding.

### **SCHEDULING**

BellSouth proposes the parties identify the issues capable of resolution without hearing by April 8, 2005. Briefs in support of those positions should be filed by April 15, reply briefs in opposition should be filed by April 29, 2005, and any responsive brief should be filed by May 6, 2005. All service should be accomplished electronically. Once the final briefs are submitted, the Authority should then resolve the legal questions within some reasonable period of time.

Following the resolution of the issues that do not require a hearing, the parties should have 15 days to submit direct testimony on the remaining issues, 30 days to submit rebuttal testimony, and 7 days to submit surrebuttal testimony. If this schedule is followed, and if the Authority makes a determination on the issues that do not require a hearing by June 1, 2005, the matter should be ready for a hearing on any remaining issues by the last week in July, 2005.

Importantly, this proposed schedule would not require direct testimony until at least June 15 (assuming the Authority did not issue its first order prior to June 1, 2005), which means that parties will have had more than 90 days to negotiate language addressing these issues in their own individual interconnection agreements. Consequently, those parties that reach agreement on issues would not be required to participate in these proceedings. At the same time, if additional points of dispute arise during the negotiations, this schedule will also allow time for such issues to be included in this proceeding.

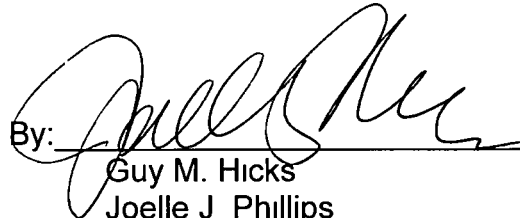
### **CONCLUSION**

BellSouth respectfully requests the Authority (1) deny the Joint Petitioners' motion to bifurcate this proceeding on the terms that the Joint Petitioners seek, (2)

bifurcate this docket in the manner described by BellSouth; (3) determine the final issues list to be used in this proceeding; and (4) adopt the procedural schedule that BellSouth has proposed

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC

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# CHANGE OF LAW GENERIC DOCKET ISSUES MATRIX

DRAFT

NO.	ISSUE DESCRIPTION
1	<b>TRRO / FINAL RULES:</b> The Section 252 process requires negotiations and to the extent parties may not be able to negotiate resolution of particular issues arising out of the Final Rules/TRRO or to the extent that new issues related to the Final Rules/TRRO arise, issues related to those matters will be added to this list.
2	<b>TRRO / FINAL RULES:</b> What is the appropriate language to implement the FCC's transition plan for (1) switching, (2) high capacity loops and (3) dedicated transport as detailed in the FCC's Triennial Review Remand Order ("TRRO"), issued February 4, 2005?
3	<p><b>TRRO / FINAL RULES:</b></p> <p><b>BELLSOUTH Issue Statement:</b> BellSouth would create two separate issues, denominated below as (a) and (b).</p> <p>a) What is the appropriate modification to existing ICAs necessary to address BellSouth's obligation to provide network elements that the FCC has found to no longer be Section 251(c) (3) obligations?</p> <p>b) For pending ICAs, what is the appropriate language to address any modification to BellSouth's obligation to provide UNEs that the FCC has found to no longer be Section 251(c) (3) obligations?</p> <p><b>CLEC Issue Statement:</b> What is the appropriate way to implement any modification to BellSouth's obligation to provide UNEs that the FCC has found to no longer be Section 251(c) (3) obligations?</p>
4	<b>TRRO / FINAL RULES:</b> What is the appropriate language to implement BellSouth's obligation to provide Section 251 unbundled access to high capacity loops and dedicated transport?
5	<b>TRRO / FINAL RULES:</b> Does the Authority have the authority to determine which wire centers meet the FCC's criteria for non-impairment under Section 251 with regard to high capacity loops and dedicated transport? (OPEN TO BELLSOUTH)
6	<p><b>TRRO / FINAL RULES:</b></p> <p>(a) Does the Authority have the authority to determine whether BellSouth's implementation of the FCC's criteria for non-impairment under Section 251 with regard to high capacity loops and dedicated transport is proper; (b) what process should be used [BellSouth's language: now and in the future to identify those wire centers that meet the FCC's criteria for non-impairment under Section 251 with regard to high capacity loops and dedicated transport?]; [CLECs' language: to make that determination?]; and (c) what language is appropriate to implement [BellSouth's language: the FCC's rules regarding impairment as it relates to access to high capacity loops and dedicated transport in the wire centers where there has been a determination that there is no impairment?]; [CLECs' language: that process?]; (OPEN TO BOTH)</p>

NO.	ISSUE DESCRIPTION
7	<b>TRRO / FINAL RULES:</b> Are HDSL-capable copper loops the equivalent of DS1 loops for the purpose of evaluating impairment?
8	<b>TRRO / FINAL RULES:</b> Once a determination is made that CLECs are not impaired without access to high capacity loops or dedicated transport pursuant to the FCC's rules, can changed circumstances reverse that conclusion, and if so, what process should be included in Interconnection Agreements to implement such changes?
9	<p><b>TRRO / FINAL RULES:</b></p> <p>(a) Does the Authority have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?</p> <p>(b) If the answer to part (a) is affirmative in any respect, does the Authority have the authority to establish rates for such elements?</p> <p>(c) If the answer to part (a) or (b) is affirmative in any respect, (i) what language, if any, should be included in the ICA with regard to the rates for such elements, and (ii) what language, if any, should be included in the ICA with regard to the terms and conditions for such elements?</p>
10	<b>TRRO / FINAL RULES:</b> What, if any, conditions, should be imposed on moving, adding, and/or changing orders to a CLECs' respective embedded bases of switching, high-capacity loops and dedicated transport and what is the appropriate language to implement such conditions, if any?
11	<b>TRRO/FINAL RULES:</b> What rates, terms, and conditions should govern the transition of existing network elements that BellSouth is no longer obligated to provide as Section 251 UNEs to non-Section 251 network elements and other services?
12	<b>TRRO / FINAL RULES:</b> What rates, terms and conditions, if any, should apply to UNEs that are not converted on or before March 11, 2006, and what impact, if any, should the conduct of the parties have upon the determination of the applicable rates, terms and conditions that apply in such circumstances?
13	<b>TRRO / FINAL RULES:</b> Should identifiable orders properly placed that should have been provisioned before March 11, 2005, but were dropped due to BellSouth errors in order processing or provisioning, be included in the "embedded base?"
14	<b>TRRO / FINAL RULES:</b> Should network elements de-listed under section 251(c) (3) be removed from the SQM/PMAP/SEEM?
15	<b>TRO - COMMINGLING:</b> What is the scope of commingling allowed under the FCC's rules and orders and what language should be included in Interconnection Agreements to implement commingling (including rates)?
16	<b>TRO - CONVERSIONS:</b> Is BellSouth required to provide conversion of special access circuits to UNE pricing, and, if so, at what rates, terms and conditions and during what timeframe should such new requests for such conversions be effectuated?
17	<b>TRO – CONVERSIONS:</b> What are the appropriate rates, terms, conditions and effective dates, if any, for conversion requests that were pending on the effective date of the TRO?
18	<b>TRO – LINE SHARING:</b> Is BellSouth obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004?

NO.	ISSUE DESCRIPTION
19	<b>TRO – LINE SHARING – TRANSITION:</b> If the answer to foregoing issue is negative, what is the appropriate transition language for existing CLEC line sharing arrangements?
20	<b>TRO – LINE SPLITTING:</b> What is the appropriate ICA language to implement BellSouth's obligation with regard to line splitting?
21	<b>TRO – SUB-LOOP CONCENTRATION:</b> What is the appropriate ICA language, if any, to address sub loop feeder and/or sub loop concentration?
22	<b>TRO – PACKET SWITCHING:</b> What is the appropriate ICA language, if any, to address packet switching?
23	<b>TRO – CALL-RELATED DATABASES:</b> What is the appropriate ICA language, if any, to address access to call related databases?
24	<b>TRO – GREENFIELD AREAS:</b> What is the appropriate language to implement BellSouth's obligation, if any, to offer unbundled access to newly-deployed or 'greenfield' fiber loops, including fiber loops deployed to the minimum point of entry ("MPOE"), as defined in federal or state rules, of a multiple dwelling unit that is predominantly residential, and what, if any, impact does the ownership of the inside wiring from the MPOE to each end user have on this obligation? ( <b>CLECS DISAGREE WITH THE INCLUSION OF THE HIGHLIGHTED LANGUAGE</b> )
25	<b>TRO – HYBRID LOOPS.</b> What is the appropriate ICA language to implement BellSouth's obligation to provide unbundled access to hybrid loops?
26	<b>TRO – END USER PREMISES:</b> Under the FCC's definition of a loop found in 47 C.F.R. §51.319(a), is a mobile switching center or cell site an "end user customer's premises"?
27	<b>TRO – ROUTINE NETWORK MODIFICATION:</b> What is the appropriate ICA language to implement BellSouth's obligation to provide routine network modifications?
28	<b>TRO – ROUTINE NETWORK MODIFICATION:</b> What is the appropriate process for establishing a rate, if any, to allow for the cost of a routine network modification that is not already recovered in the Commission approved recurring or non-recurring rates? What is the appropriate language, if any, to incorporate into the ICAs?
29	<b>TRO – FIBER TO THE HOME:</b> What is the appropriate language, if any, to address access to overbuild deployments of fiber to the home and fiber to the curb facilities?
30	<b>TRO – EELS AUDITS:</b> What is the appropriate ICA language to implement BellSouth's EEL audit rights, if any, under the TRO?
31	<b>252(i):</b> What is the appropriate language to implement the FCC's "entire agreement" rule under Section 252(i)?
32	<b>ISP Remand Core Forbearance Order:</b> What language should be used to incorporate the FCC's <i>ISP Remand Core Forbearance Order</i> into interconnection agreements?

NO.	ISSUE DESCRIPTION
33	<p data-bbox="167 1843 199 1942"><b>General Issue:</b></p> <p data-bbox="240 1843 313 1942"><b>BELLSOUTH Issue Statement:</b> Should the determinations made in this docket apply to all interconnection agreements approved by the Authority?</p> <p data-bbox="354 1843 493 1942"><b>CLEC Issue Statement:</b> This is not an appropriate issue for this docket. There is a due process problem with the issue proposed by BellSouth, and a legal impossibility of denying any CLEC – even those who actively participate in this proceeding, their arbitration rights under the Act. Any party can later argue the effect, as precedent, of a ruling in this docket.</p>

3/28/2005 8:43 AM

## CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2005, a copy of the foregoing document was served on the following; via the method indicated:

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